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U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

MAR 29 2004

File: WAC 02 220 54776 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a private school. It seeks to employ the beneficiary permanently in the United States as a pre-school teacher. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted on November 15, 2000. The proffered salary as stated on the labor certification is $12 per hour, which equals $24,960 per year.

With the petition counsel submitted a copy of the petitioner's 2001 Form 990 Return of an Organization Exempt from Income Tax. The return shows that the petitioner declared an excess of $3,710 at the end of 2001 and that its year-end current liabilities exceeded its year-end current assets.

Counsel also submitted a letter, dated June 27, 2002, in which she stated that the petitioner had new management and anticipated better financial performance.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 30, 2002, requested additional evidence in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Service Center specifically requested that the petitioner also provide (1) a complete copy of its 2000 federal tax return, (2) copies of its 2000 and 2001 Form W-2 Wage and Tax Statements and W-3 Transmittal, and (3) copies of its California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, counsel submitted a letter, dated December 23, 2002, in which she stated that she was providing the requested documents. In fact, counsel provided the petitioner's California Form DE-6 Quarterly Wage Reports for the last quarter of 2001 and the first quarter of 2002, whereas the Service Center had requested the reports for the previous four quarters. The California Form DE-6 Quarterly Wage Reports and the 2000 and 2001 W-2 and W-3 forms show that the petitioner did not employ the beneficiary during 2000, 2001, or the first quarter of 2002.

Counsel did not provide copies of annual reports or audited financial statements. The 2000 Form 990 Return of Organization Exempt from Income Tax shows that the petitioner declared an excess of $41,445 at the end of 2000.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and, on January 10, 2003, denied the petition.

On appeal, counsel provided a letter, dated February 7, 2003, from the petitioner's previous president. The previous president states that beginning early in 2001, family pressures distracted her from her management duties and resulted in her doing a poor job and, therefore, in the school's poor financial performance. She further states that she relinquished her duties during the spring of 2002. She also stated that, had it been necessary, she was willing and able to forego the $13,500 in compensation that the school paid her during 2001.

Counsel also provided a letter, dated February 10, 2003, from the petitioner's current president concurring that the school's poor financial performance was due to previous poor management. The current president states that he was willing and able in the past, and will be willing and able in the future, to forego compensation as necessary to pay the proffered wage.

Finally, counsel provided a copy of the petitioner's 2002 Form 990 Return of an Organization Exempt from Income Tax. The return states that the petitioner declared an excess of $6,711 at the end of 2002. That return also shows that at the end of the year the petitioner had current assets of $12,361 and current liabilities of $1,577, which yields net current assets of $10,784. Counsel asserts that this return demonstrates that the petitioner is now financially successful, or is becoming so.

Counsel argues that the petitioner's former president's willingness during 2001, to forego her compensation demonstrates that the petitioner could have paid the proffered wage during that year. Counsel also notes that the petitioner's Line 59 total assets at the end of 2001 were $10,381 and that this amount added to the petitioner's president's $13,500 in compensation during 2001 equals $23,850. Counsel appears to imply that this calculation is in some way pertinent to the determination of the petitioner's ability to pay the proffered wage. This office notes that, even if that calculation were appropriate to the determination of the ability to pay the proffered wage, the proffered wage exceeds $23,850.

Counsel cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that CIS is obliged to view the record as a whole, rather than focusing on only one line-item during one year.

Counsel is correct that, if the petitioner's very low profits are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. *Sonegawa* does, in fact, stand for that proposition.

The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations, and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines.

Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Here, the record contains no evidence that the petitioner has ever posted a large profit. Even assuming past poor management, little reason exists in the record to believe that the petitioner will be much more successful in the future. Assuming that the petitioner will flourish, with or without hiring the beneficiary, is speculative.

Counsel asserts that the petitioner's past and present presidents were both able to forego their compensation as necessary to pay the proffered wage. As evidence of that assertion, counsel provides letters from the past and president presidents. The record does not contain information pertinent to those presidents' budgets or evidence that they are independently wealthy. Although counsel and the petitioner's presidents have asserted that they could forego compensation the evidence in the record is insufficient to prove that ability. As such, no part of the compensation of the petitioner's past and present presidents shall be considered in the determination of the ability to pay the proffered wage.

The proffered wage is $24,960. The petitioner declared an excess of $41,445 during 2000. That amount was available to pay the proffered wage. The petitioner has, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner declared an excess of $3,710 at the end of 2001. Counsel asserts that the petitioner's Line 59 total assets at the end of 2001, $10,381, should also be included in the calculation of the petitioner's ability to pay the proffered wage. That amount, however, includes the depreciated basis of the petitioner's land, buildings, and equipment. That amount is not the sort of liquid asset that could be used to pay the proffered wage. If the petitioner had net current assets, the amount of those net current assets could be included in the calculation of the ability to pay the proffered wage. As was noted above, however, the petitioner's current liabilities at the end of 2001 exceeded its current assets. The petitioner had negative net current assets at the end of that year. The petitioner has not shown the ability to pay the proffered wage during 2001 out of its declared excess for the year or its net current assets.

The petitioner declared an excess of $6,711 at the end of 2002. At the end of the year the petitioner had current assets of

$12,361 and current liabilities of $1,577, which yields net current assets of $10,784. Those amounts were insufficient to pay the proffered wage of $24,960. The petitioner has not demonstrated that it was able to pay the proffered wage during 2002.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.